STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2013
v ZAJUAN NENROD, a/k/a DAQUAN SISTRUNK, Defendant-Appellant.	No. 308340 Wayne Circuit Court LC No. 11-007536-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CLETE ROBINSON, Defendant-Appellant.	No. 308341 Wayne Circuit Court LC No. 11-007536-FH

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Defendants Zajuan Nenrod and Clete Robinson were tried jointly before a single jury. The jury convicted both defendants of possession with intent to deliver more than 50 but less than 450 grams of heroin, MCL 333.7401(2)(a)(iii), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced each defendant to 7 to 20 years' imprisonment for possession with intent to deliver heroin and to time served for possession of marijuana. After both defendants appealed by right, their cases were consolidated.[1] Because neither defendant has established that reversible error occurred, we affirm.

[1] *People v Nenrod*, unpublished order of the Court of Appeals, entered February 15, 2012 (Docket Nos. 308340 & 308341).

Defendants' convictions arise from the seizure of heroin and marijuana during the execution of a search warrant at a house in Detroit. During pre-raid surveillance, a controlled purchase of heroin was made at the house. The seller was not identified at trial. According to police witnesses, as officers approached the house to execute the warrant, Robinson quickly closed an oven door in the kitchen and then closed the front door of the house. When the police entered the house, Nenrod and Robinson were the only people in the kitchen where 15.4 grams of packaged marijuana and 24.7 grams of heroin were discovered inside the oven. A digital scale and drug packaging materials were observed on the kitchen counter. An additional 68.14 grams of heroin was discovered inside the pocket of a coat that was hanging on a bedroom doorknob. Neither defendant owned the house. However, police found rental documents addressed to Nenrod, Robinson's birth certificate, and photographs of both Nenrod and Robinson in the house. In addition, Nenrod and Robinson each had a key to the front door in their possession at the time of the search. The prosecution's theory at trial was that Nenrod and Robinson had joint constructive possession of drugs intended for distribution. Both defendants maintained they did not live in the house and did not possess the drugs.

I. DEFENDANT NENROD (DOCKET NO. 308340)

A. EFFECTIVE ASSISTANCE OF COUNSEL

Nenrod argues that his trial counsel proved ineffective by providing incorrect legal advice that resulted in Nenrod's decision not to testify at trial.[2] We disagree.

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Swain*, 288 Mich App at 643.

Nenrod argues that his decision not to testify at trial was based on defense counsel's erroneous legal advice that if he elected to testify, the prosecutor could impeach his credibility with evidence of his three prior convictions for possession of less than 25 grams of a controlled substance.[3] As Nenrod acknowledges, the sole support for his assertion regarding defense

[2] "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[3] We agree that Nenrod's convictions were not admissible as impeachment evidence under MRE 609(a).

counsel's allegedly-incorrect advice is his post-conviction affidavit.[4] However, the averments in his affidavit are contradicted by the record. After the prosecution rested, Nenrod informed the court that he wished to testify. After defense counsel requested an opportunity to consult with Nenrod, he changed his mind and elected not to testify. At sentencing, Nenrod explained that he changed his mind because he believed "that the police officers did not prove [him] guilty." Nenrod's decision not to testify, in light of his belief that the prosecution had failed to prove the elements of the charged crimes beyond a reasonable doubt, constituted reasonable trial strategy, *People v Toma*, 462 Mich 281, 304; 613 NW2d 694 (2000), which we will not second-guess, *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011).

Moreover, Nenrod has failed to establish that, had the jury heard his testimony, there is a reasonable probability that his trial would have resulted in acquittal. *Swain*, 288 Mich App at 643. "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted). Nenrod asserts that his testimony would have enabled him to explain to the jury that he was not involved in the distribution of narcotics and had no knowledge that there was heroin inside the house. However, his affidavit does not identify any specific proposed testimony the substance of which was not already asserted by the defense.

Through cross-examination and argument, defense counsel asserted the defense theory of the case: that Nenrod did not have knowledge or possession of the drugs, did not own the house, and that many other individuals had access to the house. In support of its theory, the defense called Nenrod's uncle, Benjamin Sistrunk, as a witness. Sistrunk testified that he was present when the raid occurred and did not see any drugs inside the house before the raid. Sistrunk testified that, at the time of the raid and contrary to the police testimony, he and three other men were in the kitchen playing cards while Nenrod and Robinson played chess in the living room. Sistrunk claimed that he and another man also had keys to the house. He explained that no one actually lived there; rather, it was used as a "hang out" to watch sports, play cards, and shoot pool. Sistrunk further testified regarding photographs offered by the defense that depicted the house as fully furnished, contrary to police testimony. Thus, the arguments that Nenrod's testimony would purportedly advance were before the jury, and he has not established that his unspecified general denials would have added anything substantial to the evidence and arguments introduced at trial. *Payne*, 285 Mich App at 190.

We conclude that Nenrod has failed to present sufficient evidence to support his claim that his decision not to testify was based on erroneous legal advice provided by defense counsel. At sentencing, Nenrod indicated that his decision was based on his belief that the prosecution failed to prove the necessary elements of the charged crimes, a reasonable trial strategy, *Toma*,

[4] Nenrod did not move this Court to remand his case for a hearing under *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973) in order to establish factual support for his claim of ineffective assistance of counsel. Accordingly, our review is limited to errors apparent on the record. *Jordan*, 275 Mich App at 667.

462 Mich at 304, that did not fall below objective standards of reasonableness, *Swain*, 288 Mich App at 643. Moreover, Nenrod has not established a reasonable probability that his testimony would have affected the outcome of the trial. *Id*. Accordingly, he is not entitled to a new trial on the basis of ineffective assistance of counsel.

B. SUFFICIENCY OF THE EVIDENCE

Nenrod next argues that the prosecution presented insufficient evidence to establish that he possessed the drugs or intended to deliver the heroin.[5] We disagree.

> In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the trier of fact's verdict. [*People v Strickland*, 293 Mich App 393, 399; 810 NW2d 660 (2011) (quotation marks and brackets omitted).]

1. CONSTRUCTIVE POSSESSION

"The element of possession . . . requires a showing of dominion or right of control over the drug with knowledge of its presence and character." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003) (quotation marks and citations omitted). "[P]ossession may be either actual or constructive, and may be joint as well as exclusive." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). "The essential issue is whether the defendant exercised dominion or control over the substance." *McKinney*, 258 Mich App at 166. "[C]ircumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession." *Fetterley*, 229 Mich App at 515.

Viewing the evidence in the light most favorable to the prosecution, we find that a reasonable jury could conclude that circumstantial evidence established the Nenrod constructively possessed the drugs. Police found documents indicating that Nenrod was renting the house and found Nenrod in possession of a key to the front door. See *People v Wolfe*, 440 Mich 508, 522; 489 NW2d 748 (1992) (possession established where the defendant had the only key to the apartment where drugs were discovered); *McKinney*, 258 Mich App at 166 (possession established where the defendant shared the bedroom where drugs were located); *People v Nunez*, 242 Mich App 610, 615-616; 619 NW2d 550 (2000) (possession established where police found utility bills addressed to the defendant, the defendant had a key to the apartment, and a witness testified that the defendant resided in the apartment). When the officers forcibly entered the house, Nenrod and Robinson were the only people inside the kitchen where the drugs and packaging materials were found. See *People v Meshell*, 265 Mich App 616, 622;

[5] Whether a defendant's conviction was supported by sufficient evidence is reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).

696 NW2d 754 (2005) (possession established where the defendant was found alone in a garage where methamphetamine was being cooked). In one bedroom, the police found an additional 68.14 grams of heroin inside the pocket of a coat that was hanging on a doorknob. Inside the same bedroom, the police found a briefcase containing rental-related correspondence addressed to defendant Nenrod at the residence. Also inside the briefcase were several photographs of Nenrod and Robinson together. See *Nunez*, 242 Mich App at 615-616; *McKinney*, 258 Mich App at 166. Accordingly, the reasonable inferences arising from the evidence, considered together, were sufficient to enable the jury to find beyond a reasonable doubt that Nenrod was not simply present inside the house, but rather, constructively possessed the drugs.

2. INTENT TO DELIVER HEROIN

To show intent to deliver, proof of actual delivery is not required. *Wolfe*, 440 Mich at 524. "Intent to deliver has been inferred from the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Id*. Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish intent to deliver. *Fetterley*, 229 Mich App at 515.

Police confiscated at least 68.14 grams of heroin, a digital scale, and unused sandwich baggies "[r]ight next to the scale." A narcotics officer explained that the 68.14 grams of heroin had a street value of $70,000 and that the type of digital scale found in the kitchen is commonly used to measure or weigh small to large increments of narcotics, and that the baggies found next to the scale are commonly used to hold the designated amount of drugs. The jury could reasonably infer from the quantity of the heroin and the presence of materials commonly associated with drug trafficking that the heroin was intended for delivery, not personal use.

Accordingly, the evidence was sufficient to sustain Nenrod's convictions for possession with intent to deliver more than 50 but less than 450 grams of heroin and possession of marijuana.

C. FAIR CROSS SECTION AND *BATSON* CHALLENGES

Nenrod argues that he was deprived of his right to an impartial jury because the jury was not drawn from a fair cross-section of the community and because the prosecution dismissed a juror solely on the basis of race in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).[6] We disagree.

[6] Because Nenrod did not raise a *Batson* objection to the prosecutor's use of peremptory challenges or argue a violation of the fair cross-section requirement in the trial court, these issues are unpreserved and our review is limited to plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A criminal defendant is entitled to an impartial jury drawn from a fair cross-section of the community. *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975). To establish a prima facie violation of the fair cross-section requirement, a defendant has the burden of proving the following:

> "(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury-selection process." [*People v Bryant*, 491 Mich 575; 822 NW2d 124 (2012), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

As an African-American, Nenrod is a member of a distinctive group for purposes of the fair cross-section requirement. Nenrod has failed, however, to set forth any basis for finding a systematic exclusion of African-Americans in Wayne County's jury-selection process. Further, there is no indication in the record that African-Americans were underrepresented in his jury venire, and we will not search for a factual basis to sustain or reject Nenrod's position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Consequently, Nenrod has failed to establish a prima facie violation of the fair cross-section requirement.

Although no objection was raised at trial, defendant now argues that the prosecutor exercised peremptory challenges in violation of *Batson*. We reject this claim as defendant has failed to establish even a prima facie case of discrimination. The prosecutor exercised only one peremptory challenge to excuse a prospective juror. Moreover, although defendant is African-American, the record does not reveal that prospective juror's race and so defendant cannot establish a prima facie case under *Batson*. Assuming, arguendo, that the excused juror was a member of a certain racial group, the mere fact that the prosecutor used a peremptory challenge to excuse him is insufficient in itself to establish a prima facie case of discrimination. *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Moreover, Nenrod acknowledges that two African-Americans were on the jury, which militates against a finding of purposeful discrimination. *Id.*

D. FRAUD UPON THE COURT

Nenrod claims that a member of the police raid team committed fraud upon the court by forging his supervisor's signature on a preliminary police report.[7] We disagree. The record is devoid of factual support for Nenrod's claim that the police report was forged. On appeal, Nenrod merely presents a copy of the report and asks this Court to deduce that the signature is a forgery. As the appellant, Nenrod is required to do more than merely announce his position and leave it to this Court to discover and rationalize the basis for his claim. *Wiley v Henry Ford*

[7] Because Nenrod did not challenge the authenticity of the police officer's signature below, this issue is unpreserved and our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Cottage Hosp, 257 Mich App 488, 499; 668 NW2d 402 (2003). Moreover, as the prosecution aptly notes, even if the raid officer signed his supervisor's name, Nenrod has made no showing of how the alleged fraud affected the outcome of the trial. *Carines*, 460 Mich at 763-764. We therefore reject this claim of error.

E. CUMULATIVE ERROR

Lastly, Nenrod argues that cumulative effect of several alleged errors operated to deny him a fair trial. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). We disagree.

Nenrod argues that defense counsel was ineffective in several ways. For the majority of his claims, he merely sets forth declarative statements without carrying his burden of establishing the factual predicate of his ineffective assistance of counsel claims. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). For those matters where the factual basis can be discerned, we can identify no cognizable errors warranting relief. As discussed above, Nenrod has not shown that any preliminary police report was actually forged or how the alleged forgery affected the outcome of his trial. Therefore, Nenrod has not shown that, but for counsel's failure to pursue such a claim, there is a reasonable probability that the outcome of the trial would have been different. *Swain*, 288 Mich App at 643.

With regard to the pre-raid controlled buy at the house, defense counsel apparently chose to move in limine to preclude any mention that Nenrod was identified as an actual seller or a person of interest, as opposed to presenting the confidential informant and narcotics officer as witnesses. Contrary to Nenrod's assertion, defense counsel was not ineffective for failing to act in accordance with his instructions to do otherwise. Decisions about defense strategy, including what arguments to make, what evidence to present, and how to impeach witnesses, are matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), which we will not second-guess, *Benton*, 294 Mich App at 203.

There being no error, there can be no cumulative effect that operated to deny Nenrod a fair trial. See *Mayhew*, 236 Mich App at 128.

II. DEFENDANT ROBINSON (DOCKET NO. 308341)

A. SUFFICIENCY OF THE EVIDENCE

Robinson first argues that his conviction for possession with intent to deliver more than 50 more but less than 450 grams of heroin must be vacated because the evidence failed to establish that he possessed the quantity of heroin found in the coat pocket.[8] We disagree.

[8] Again, whether a defendant's conviction was supported by sufficient evidence is reviewed de novo. *Harverson*, 291 Mich App at 177.

Robinson appears to concede that the evidence was sufficient to establish that he constructively possessed the heroin found in the kitchen oven given his actions in closing the oven door when the police began their entry. Robinson argues, however, that the evidence was insufficient to establish that he constructively possessed the heroin found in the coat pocket. Therefore, because less than 50 grams of heroin was found in the oven, Robinson argues that his conviction for possession with intent to deliver more than 50 but less than 450 grams of heroin must be reversed.

68.14 grams of heroin were discovered in a bedroom in the pocket of a coat hanging on a door. In that same bedroom, the police found Robinson's birth certificate and several photographs of Robinson and Nenrod. At the time of his arrest, Robinson also possessed a key to the front door of the house. These facts, along with his closing the oven door, considered together and viewed in a light most favorable to the prosecution, were sufficient to enable a rational jury to conclude beyond a reasonable doubt that Robinson possessed the heroin found in the bedroom. See *Wolfe*, 440 Mich at 522; *McKinney*, 258 Mich App at 166.

Robinson's reliance on *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002) is misplaced. There, police found heroin in a dress hanging in a bedroom closet. *Id*. at 420. This Court reversed defendant's possession conviction on the basis of insufficient evidence, finding "no 'direct evidence' that the defendant resided at the apartment or knew about the contraband[,]" "that no fingerprint evidence placed the defendant near the drugs[,]" and that "no evidence established that the defendant owned the dress in which the drugs were found." *Id*. at 421-422. However, the Supreme Court reversed and reinstated the defendant's conviction, finding that this Court "failed to view the evidence in the light most favorable to the prosecution" and that the "[c]ircumstantial evidence suggested that the defendant resided in the apartment[,]" due to mail in the bedroom addressed to her and the fact that she was found in the parking lot behind the apartment. *Id*. at 422. In the instant case, the police found Robinson's birth certificate and pictures of him in the bedroom where the heroin was found in the coat pocket and Robinson himself was found inside the house with a key. Accordingly, under *Hardiman* and the other relevant caselaw, the evidence was sufficient to establish that Robinson constructively possessed the heroin found in the coat pocket.

B. ADJOURNMENT AND SUBSTITUTE COUNSEL

Robinson next argues that the trial court abused its discretion by refusing to grant an adjournment to allow for the appointment of substitute counsel, or alternatively, to allow defense counsel more time to prepare for trial.[9] We disagree.

For each of defendant Robinson's alternative claims, he must demonstrate good cause and prejudice. "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown[.]" MCL 768.2. A defendant must also show prejudice

[9] A trial court's decisions regarding substation of counsel, *Traylor*, 245 Mich App at 462, and request for adjournment, *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003), are reviewed for an abuse of discretion.

as a result of the trial court's alleged abuse of discretion in denying an adjournment. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). Further,

> [a]n indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*Traylor*, 245 Mich App at 462 (citation omitted).]

Robinson failed to demonstrate good cause to support either substitution of counsel or an adjournment. Robinson expressed dissatisfaction with defense counsel's preparedness because defense counsel did not contact a witness that Robinson had recommended. He was also unsatisfied with the extent of his communication with counsel before trial and because counsel mistakenly stated that the narcotics charge involved cocaine instead of heroin. However, there is no record that defense counsel ever indicated that he was unprepared for trial or needed more time. To the contrary, counsel appeared to be fully aware of the facts of the case, which were not overly complex, and advised the court that he was ready to proceed. Although defense counsel referred to the charged offense as possession of cocaine, rather than possession of heroin, the trial court correctly explained that the apparent misstatement did not indicate unpreparedness because charges for possession of heroin and possession of cocaine were ostensibly the same, i.e., possession of a controlled substance.

Robinson acknowledged talking on the phone to counsel before trial and in person on the day of trial. Again, the record discloses that counsel was familiar with the facts of the case. During trial, defense counsel thoroughly cross-examined police witnesses about Robinson's lack of connection to the drugs and the house, discussed the police's handing of the evidence, and brought up the other four men in the house. In closing argument, counsel continued to highlight the lack of evidence connecting Robinson to the drugs. Moreover, other than the alleged failure to contact a prospective defense witness, Robinson does not indicate what outcome-determinative action defense counsel could have taken if he had more time to prepare.

Robinson identifies the previously unnamed defense witness as Willie Sistrunk, one of the men present in the house at the time of the raid. According to Robinson, Willie Sistrunk would have testified that the drugs belonged to Nenrod only, and that Robinson was in the living room at the time of the raid. During trial, however, defense counsel argued that the drugs did not belong to Robinson, and Benjamin Sistrunk testified that both Robinson and Nenrod were in the living room at the time of the raid. More importantly, in an affidavit attached to Robinson's motion to remand as an "offer of proof," appellate counsel averred that he had tried to speak with Willie Sistrunk, "but he has not yet returned [his] messages." Thus, Robinson has not established that the proposed witness would have actually testified as Robinson claims, or shown that his testimony would have made a difference in the outcome of the trial.

Robinson was also dilatory in waiting until the day of trial to request new counsel. The jurors and witnesses were already present, and the prosecutor and defense counsel were ready to

proceed. A substitution of counsel at that point would have unreasonably delayed the judicial process. Although Robinson asserts that he did not raise this matter at the final conference because he was ordered to take a drug test, he still had more than three weeks before trial to contact the court regarding any dissatisfaction with appointed counsel. Because Robinson is unable to show either good cause or actual prejudice, we find that the trial court did not abuse its discretion by denying Robinson's requests for an adjournment and substitute counsel. *Snider*, 239 Mich App at 421; *Traylor*, 245 Mich App at 462.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro